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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1218

ANTHONY R. RUSSO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on December 29, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The Court of Appeals on February 9, 1976, issued an order staying mandate until final disposition in this Court. A copy of that order and of the order denying rehearing are also in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on December 29, 1975. A timely petition for rehearing, or in the alternative for rehearing before the Court en banc, was filed therein and was denied on January 26, 1976. This petition for writ of certiorari is filed within thirty (30) days of that order. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the omission from a wiretap application and order of a name of a known offender whose communications are to be overheard, requires suppression of his conversations as unlawfully intercepted?

2. Does 18 U.S.C. 2518 require the identity in wiretap orders of all known persons who the Government hopes to intercept over the target phone or only those who own or who are previously known to use the telephone?

3. Whether the judicially fashioned rule of harmless error can be applied so as to make admissible that which is statutorily inadmissible?

4. Where a Prosecution witness has been impeached by his prior inconsistent statements must the Court, on request, instruct the jury that such prior statements are not substantive evidence of guilt?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I of the United States Constitution:

Section 1.

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Section 8.

"The Congress shall have Power . . .;

To constitute Tribunals inferior to the Supreme Court . . .;

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III of the United States Constitution:

Section 1.

"The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish. . ."

Section 2.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . .

. . . In all the other Cases before mentioned, the Supreme Court shall have appellate jurisdiction, both

as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

. . ."

Amendment IV to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment VI to the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 2511:

"(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

. . .

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this sub-section.

. . ."

Section 2515:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Section 2516:

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications. . ."

Section 2518:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . .

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is

to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

. . .

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

. . .

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

. . .

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter and must terminate upon attainment of the authorized objective, or in any event in thirty days.

. . .

(8). . .

(c) any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

. . .

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Section 2520:

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, . . . such communications. . ."

STATEMENT OF THE CASE

Petitioner, an attorney at law (hereinafter referred to as Russo), Thomas E. Dailey (the Chief of the Vice Unit of the Kansas City, Kansas Police Department), William M. Lowman, and Jerry W. Lawson (a patrolman on the same police department) were charged in

the United States District Court for the District of Kansas, by an Indictment which attempted to charge a conspiracy to violate Section 1952 of Title 18, United States Code, involving the alleged travel and use of interstate facilities to operate and promote an illegal business involving bribery and prostitution.

Lawson and Lowman, who were business partners in the operation of massage parlors and in prostitution activities in various apartments in Kansas City, Kansas, and Junction City, Kansas, pled guilty and testified against Petitioner and Dailey. The gist of the testimony was that Lowman was paying Russo (who was not a public official) money, part of which was allegedly paid over to Dailey in return for Russo's representation of any of Lowman's girls that were arrested and for prior warnings of raids and inspections. Lowman was also making payments to Dailey through Lawson. Lawson admitted, however, that he was keeping part of these alleged payoffs. Russo did not know of these latter payments. Russo did not participate in the operation of the massage parlors or prostitutes but did represent some of the employees when they were arrested. No payments were made to Russo, as to the apartment's operation.

Russo owned several apartment units and Lowman rented one such unit through Russo's rental agent. Jodie White, a/k/a Baker engaged in acts of prostitution at this apartment and Lowman, whose home was in Urbana, Missouri, stayed there during the week. Russo engaged in two acts of sexual intercourse with Ms. White at this apartment. Ms. White had asked Russo to assist her husband who was then confined in the penitentiary. When the rental agent advised Russo of complaints regarding the activities at this apartment,

Russo advised him to have the other tenants to call the police. There was no evidence Russo traveled in or used interstate facilities.

Court-authorized electronic surveillance, both oral and wire, was had at two of the massage parlors and at one apartment. Russo was intercepted in at least five telephone conversations which were admitted in evidence over his objections. These and other intercepted conversations corroborated Lowman's testimony regarding a meeting with Russo at Russo's office at which he observed Dailey and made a part payment towards a "payoff." The wiretap also corroborated Jodie White's testimony regarding her intercourse with Russo. Other intercepted conversations, not involving Russo, contained references to the alleged payoffs to Russo.

Petitioner filed pretrial motions to suppress the wiretaps seized as a result of the original order and the subsequent extension orders. The District Court found that while Russo was a person "known" to be committing the offense, it was not necessary that he be named in the order as one whose communications were to be intercepted because he was not shown to be "the owner of, or a person likely to be using the particular telephone to which the wiretaps were attached." During the monitoring of the wiretap the FBI agents were aware that it was Russo that was being intercepted and being discussed, and he was intercepted and discussed prior to the extension orders. The Affidavit in support of the Application for the initial wiretap order set forth, as the District Court found, probable cause as to Russo and sought authority for a wiretap so as to secure "prosecutable" evidence against Russo and others. Neither the original application or order, nor the subsequent extension applica-

tions and orders listed Russo as a target or person known to be committing the offense whose communications were to be intercepted.

Harmon, another policeman, who was alleged to be an unindicted co-conspirator, testified that when he was subpoenaed to testify before the Grand Jury he consulted Russo, as an attorney, and was advised to testify and tell the truth. Lawson, who had previously been convicted of perjury, testified only as to what Lowman told him about Russo's involvement. He likewise consulted Russo when he was originally indicted and told Russo he was innocent. Lowman was impeached by many prior inconsistent sworn and unsworn statements.

At the trial Petitioner requested an instruction to the jury in the following language:

> "The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements. . ."

The trial court refused that request, and in that regard gave the following instruction:

> "A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony; or by evidence that the witness has been convicted of a felony."

The Jury returned a verdict finding Dailey (the alleged recipient of the bribes) not guilty, but finding

Petitioner guilty. Russo was sentenced to pay a fine of $10,000 and to two years in custody.

The Court of Appeals affirmed, holding that the Government's information as to Russo's involvement, prior to the wiretap, was based upon "double hearsay", that is an informant (Ted Irving, a former business associate of Lowman) had told the agents what Lowman had told him about his making payoffs to Russo and the local police. The Court of Appeals agreed with the trial court that there was no probable cause to believe that Russo would be using the target phone (although, prior to the two extension applications and orders, Russo was actually intercepted over the phones), but disagreed with the trial court and held that the Government did not even have probable cause to believe that Russo was committing the offense (despite the recitation in the second extension affidavit that "it is also apparent that Anthony Russo and Tom Dailey . . . had some involvement in Lowman and Lawson's operation"); holding that in this case hearsay was not sufficient to establish probable cause (App. pp. A9-A10 of Opinion); and that if the failure to name Russo in the extension orders be error, it was "harmless error" (App. p. A12 of Opinion). The Court of Appeals also found no error in the instructions as given in regard to prior inconsistent statements (App. p. A15 of Opinion) without further comment.

REASONS FOR GRANTING THE WRIT

Wiretap Issues

1. The Decision Below Raises Significant and Recurring Problems Concerning Wiretap Applications and Orders As to the Requirement of Identifying Known Persons Therein Which Have Not Heretofore, but Should Be, Settled by This Court.

The modern trend in federal law enforcement seems to be in the direction of more and more electronic surveillance. The path of wiretap admissibility has indeed been rocky. This Court in *Osborn* v. *United States*, 385 U.S. 323, 87 S.Ct. 429, 15 L.Ed.2d 327 (1966) set a standard limiting the use of electronic eavesdropping and recording devices to "the most precise and discriminate circumstances, circumstances which fully (meet) the requirement of particularity." There this Court approved a court order authorizing the "wiring for sound" of an informer as being analogous to a search warrant. In *Berger* v. *New York*, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), this Court threw out a state wiretap law as being too broad, and then set out guidelines of what would be required in a constitutionally acceptable wiretap statute. This Court, in commenting on *Osborn*, said that there the intrusion on privacy "was lawful because there was sufficient proof to obtain a search warrant to make the search for the limited purpose outlined in the order of the judges. Through these 'precise and discriminate' procedures the order authorizing the use of the electronic device afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence."

Title III of the *Omnibus Crime Control and Safe Streets Act of 1968*, 18 U.S.C. 2510 et seq. was Con-

gress' attempt to enact a constitutionally acceptable wiretap law. The Fourth Amendment requires that a warrant must particularly describe the place to be searched and the persons or things to be seized.

Section 2518(1)(b)(iv) requires that each application for the interception of wire communications must contain "the identity of the person, if known, committing the offense and whose communications are to be intercepted;" and Section 2518(4)(a) requires that each such order shall specify "the identity of the person, if known, whose communications are to be intercepted."

In *United States* v. *Kahn*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974), Government investigators applied for court authorization to intercept conversations over the home telephones of Mr. Kahn, a suspected bookmaker. The judicial order approving the surveillance restricted the interception to the conversations of Mr. Kahn, who had been named in the application requesting the authorization, and "others as yet unknown." Incriminating conversations of Mrs. Kahn were intercepted, and the Kahns sought suppression of those conversations, Mrs. Kahn having been neither named in the order nor a person "as yet unknown" within the meaning of the authorization. This Court reversed the suppression order because the lower courts, in holding Mrs. Kahn to be a "known" individual who should have been named in the wiretap application and order, had construed the relevant statutory language as encompassing any individual whose existence was known to the Government and whose careful investigation would have disclosed was probably in complicity in the illegal activities forming the basis for the surveillance, it stated that Title III requires the naming of a person in the application or interception order only

when the law enforcement authorities have probable cause to believe that the individual is committing the particular offense. Therefore, once the Government possesses probable cause to suspect such complicity and use, the individual is "known" within the statutory language and must be brought to the attention of the judge ruling on the wiretap request. The basis of the *Kahn* decision was that such a requirement "does no more than identify the person whose constitutionally protected area is to be invaded."

In our present case Special Agent Patton, who made the affidavit in support of the original wiretap application, recited that he had participated in the investigation, he was "familiar with all the facts and circumstances of the offenses", and there was "probable cause to believe" that Lowman "and others as yet unknown have committed and are committing offenses involving . . . bribery," and that there was "probable cause to believe that the wire and oral communications" of Lowman and "others as yet unknown concerning these offenses will be obtained through their interception" including communications concerning their meetings, arrangements or discussions of bribery and prostitution. Patton then related the results of his investigation, including interviews with Ted Irving, a former business partner with Lowman, in which Irving related how, during his partnership with Lowman, Lowman had told him of his payoff arrangement with Petitioner and Kansas City, Kansas police officers, and how Lowman and Russo met by prearrangement. Patton also related that three other Informants and the FBI's independent investigation corroborated Irving regarding Lowman's and Russo's bribery scheme. The reliability of one of these informants was set forth in the affidavit. The reliability of Lowman and Irving

is established because their statements were admissions against their penal interest. See *United States* v. *Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

Patton concluded his affidavit that the information above described partially identified those involved and that it was "evident" from this information that "Lowman and his co-conductors use the telephone (sought to be wiretapped) to conduct prostitution and bribery offenses" and that such interceptions would supply "prosecutable evidence".

After this order Russo was intercepted over the wiretap. Agent Patton again filed an affidavit in support of the first extension order. In that affidavit he made reference to the numerous oral and wire communications relating to bribery, and recited the need of an extension so as to secure prosecutable evidence.

In a second affidavit of Patton filed simultaneously he made mention of Russo. This affidavit was in support of an application for an order, subsequently granted, authorizing a wiretap of Lowman's phone located at the apartment located in the building owned by Petitioner.

In a later affidavit of Patton in support of a further extension of the wiretap order there is reference to the prior interceptions regarding Russo and the meeting and planned meeting between Russo and Lowman regarding a payoff, and stated, "it is apparent that Anthony Russo and Tom Dailey, the head of the Kansas City, Kansas Vice-squad have some involvement in the Lowman and Lawson's operation."

The Court of Appeals, in its Opinion, held, contrary to the District Court, that the Government did

not have probable cause to believe that Russo was committing the offense. True, this is an unusual situation where it is the Defendant rather than the prosecution which is seeking to show the existence of probable cause. But could anyone seriously believe that the Court, had the situations been reversed, would have found, to justify a search warrant, that probable cause did not exist?

This Court in *Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329 (1959) emphasized the difference between what is required to show guilt in a criminal case and what is required to show probable cause for arrest or search. There petitioner had contended (as the Tenth Circuit held in the instant case) that (1) the information furnished by the informer to the FBI agent was "hearsay" and, because it was hearsay was not legally competent evidence in a criminal trial; and (2) that, even if hearsay could lawfully have been considered, the FBI agent's information should have been held insufficient to show "probable cause" and "reasonable grounds" to believe that the petitioner had violated or was violating the narcotic laws and to justify his arrest. The Court held:

> "Considering the first contention, we find petitioner entirely in error. *Brinegar* v. *United States*, 338 U.S. 160, 172-173, 69 S.Ct. 1302, 1309, 93 L.Ed. 1879 has settled the question the other way. . . . But this Court, rejecting that contention, said: '[T]he so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence, to prove the accused's guilt, of the facts relied upon to show probable cause. That emphasis, we think, goes too far in confusing and disregarding the difference between

what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved [guilt and probable cause] . . .' "

. . .

'In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' *Brinegar* v. *United States,* supra, 338 U.S. at page 175, 69 S.Ct. at page 1310. Probable cause exists where 'the facts and circumstances within their [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 288."

The requirement for identification in 18 U.S.C. 2518 is based on probable cause and not on proof of guilt.

In *Kahn,* this Court said:

"The sole provision pertaining to the identification of persons whose communications are to be intercepted is contained in Section 2518(1)(b)(iv), which requires that the application state 'the identity of the person, if known, *committing the*

offense and whose communications are to be intercepted.' (Emphasis supplied). This statutory language would plainly seem to require the naming of a specific person in the wiretap application only when law enforcement officials believe that such an individual is actually committing one of the offenses specified in 18 U.S.C. Section 2516."

The legislative history of Title III as set out in Senate Report #1097, 90th Cong., 2d Sess., 102, U.S. Code Cong. & Admin. News 1968, at p. 2191, states:

"Furthermore, Section 2518(3) requires the judge, before issuing a wiretap order, to find that there is probable cause to believe that an individual is involved with a particular offense, that particular communications concerning that offense will be intercepted, and that specific facilities are being used or are about to be used in connection with the commission of such offense, or are leased to, listed to, or commonly used by the individual. Congress inserted these provisions because it felt that, with them, 'the order will link up specific person, specific offense, and specific place. Together they are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity.' "

It should be pointed out that when the District Court held that Russo was "known" no further evidentiary hearing was held on that issue. It may well be that there is a wealth of additional evidence on that issue, yet the Court of Appeals summarily overruled the trial court on that issue.

As to whether or not the Government had probable cause to believe Russo would use the phone, it should be sufficient to point out that after the initial order he was in fact intercepted; and it was the avowed purpose of the wiretap to secure prosecutorial evidence against Russo and others, and Agent Patton continually swore that he had probable cause to believe that those involved would use those phones. Had Russo been named in the Application the issuing judge might not have granted the order.

The constitutionality of Title III rests upon its requirements of particularity. In *United States* v. *Giordano*, 416 U.S. 505, 529, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), this Court held that if the particular statutory provision plays a "central role" in the scheme of the statute then suppression must follow when it is shown that this statutory requirement has been ignored.

2. There Is a Conflict in the Applicable Decisions by the Various Courts of Appeals.

Consideration by the Supreme Court is necessary on the independent ground that the holding below conflicts squarely with *United States* v. *Donovan* (C.A. 6, 1975), 513 F.2d 337; *United States* v. *Bernstein* (C.A. 4, 1975), 509 F.2d 996, certiorari pending; *United States* v. *Moore* (U.S.App.D.C., 1975), 513 F.2d 485; and *United States* v. *Armocida* (C.A. 3, 1975), 515 F.2d 29.

The Sixth Circuit, in *United States* v. *Donovan*, supra, held failure to name, in the intercept application, a person whom the Government had probable cause to believe was engaged in illegal gambling activities, required suppression of wiretap information and/or evidence pertaining to that person. In *Donovan*, the

affidavit supporting the wiretap application indicated that reliable informants had named certain persons as being engaged in illegal gambling activities, and that that information was corroborated by physical surveillance and telephone company records.

The Fourth Circuit, in *United States* v. *Bernstein*, supra, held that when there is probable cause to believe an individual is committing a specific crime and may be overheard on a specific phone, he is known to the Government for the purpose of naming him in the application and intercept order.

In *United States* v. *Moore*, supra, the Court of Appeals for the District of Columbia held that once the Government possesses probable cause to suspect an individual's complicity in the crimes being investigated, the individual is "known" within the statutory language of Title III and must be brought to the attention of the Judge ruling on the wiretap request. In this case, also, the affidavit supporting the application for wiretap, showed three confidential informants had stated appellant, Moore, was involved in illegal gambling activities. The Court of Appeals there said:

> "To be sure, the test for probable cause is an objective one requiring an assessment of all information possessed by the Government at a particular moment in time. And if that information is sufficient to establish probable cause to believe that an individual will be using a target telephone for illegal activities, he must be named as a 'known' person in any wiretap application and order, *regardless of whether the Government believes the information has established such probable cause.*" 513 F.2d at 499. (Emphasis supplied).

The Fifth Circuit in *United States* v. *Doolittle* (C.A. 5, 1975), 507 F.2d 1368, affirmed 518 F.2d 500, rejected this position, and there is thus a conflict in the Circuits.

3. The Court of Appeals Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

The Tenth Circuit held that in this case hearsay was not sufficient to establish probable cause. As previously pointed out in this case it was a Defendant and not the Government that sought to establish the existence of probable cause.

Hearsay, including double hearsay, has long been held sufficient to establish probable cause in order to secure a search warrant. *Jones* v. *United States*, 362 U.S. 257, 80 S.Ct. 725 (1960); and see Federal Rules of Criminal Procedure, Rule 41(c), wherein it is provided in part, "the finding of probable cause may be based upon hearsay evidence in whole or in part."

Hearsay is sufficient to establish probable cause to justify an arrest. *Draper* v. *United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). It is sufficient to secure an indictment. *Costello* v. *United States*, 350 U.S. 359, 76 S.Ct. 406 (1956).

This Court has held, also, that there is no requirement that, in order to establish probable cause, there must be a showing of the reliability of the prime informant's (Irving) informant (Lowman). *Spinelli* v. *United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Of course, after the initial wiretap order and subsequent oral and wire interceptions Irving's and Lowman's reliability was substantiated by what the agents

overheard and observed. Obviously, then when the extension orders were sought the Government had probable cause that Russo was committing the offense and was using the wiretapped phones.

Harmless Error Issue

4. This Cause Involves an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

The Tenth Circuit Court of Appeals (App. p. A8 of its Opinion) found that the intercepted conversations "effectively" corroborated the testimony of the live witnesses, yet stated (App. p. A11) that they were "innocuous in content" and that the error in admission of said conversations in evidence was harmless beyond a reasonable doubt. The credibility of Lowman and Lawson was the prime issue in the trial of this case. Dailey, who was not intercepted, was acquitted; but Russo, who was intercepted, was convicted.

The "harmless error" doctrine is a court fashioned doctrine. All federal inferior courts are established by Congress. Article I, Section 8 and Article III, Section 1, of the United States Constitution. The jurisdiction of this Court is established by the Constitution and by Congress. Article III, Section 2.

It is true, of course, that the "exclusionary rule" is likewise a court fashioned rule. *Weeks* v. *United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). But in the instance of wiretaps the rule of exclusion is statutory.

In *Olmstead* v. *United States*, 277 U.S. 438, 465, 48 S.Ct. 564, 72 L.Ed. 944 (1928), Mr. Chief Justice Taft, writing for the majority of the Court, said that it was within the province of Congress to "protect the

secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in Federal criminal trials, by direct legislation." In 1934 Congress enacted the Federal Communications Act of 1934, and in Section 605 thereof (Title 47, United States Code) which attempted to do just that. In *Benanti* v. *United States*, 355 U.S. 96, 78 S.Ct. 155, 2 L.Ed.2d 126 (1957) this Court held that that prohibition applied to the introduction of such evidence in a federal trial even though it was obtained by state officers. In *Lee* v. *Florida*, 392 U.S. 378, 88 S.Ct. 2096, 20 L.Ed.2d 1166 (1968) such evidence was held inadmissible even in a state criminal trial, where it was obtained in violation of Section 605. After *Osborn*, supra, and *Berger*, supra, Congress enacted the statutes in question, 18 U.S.C. 2510 et seq. This statutory scheme makes it unlawful to intercept, or to divulge or use information obtained thereby, wire or oral communications, 18 U.S.C. 2511 and makes evidence obtained thereby inadmissible, 18 U.S.C. 2515, except in specific limited instances. See *Alderman* v. *United States*, 394 U.S. 365, 89 S.Ct. 961 (1969). One of those instances was called into play in this case, i.e.: court authorized interception of oral and wire communications, under 18 U.S.C. 2516.

Section 2516 specifically provides that such orders must be in conformity with Section 2518. And 18 U.S.C. 2518 requires that applications for such orders must include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." That section also requires that such orders "*shall* specify the identity of the person, if known, whose communications are to be intercepted."

Criminal penalties, 18 U.S.C. 2511(1), contempt authority, 18 U.S.C. 2518(8)(c), and civil damages, 18

U.S.C. 2520, are provided for violations of this statutory scheme. Section 2518(10)(a) provides for the suppression of evidence obtained not in conformity with this scheme. In *United States* v. *Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), this Court held that primary or derivative evidence secured by wiretaps pursuant to court order issued in response to an improperly authorized application must be suppressed upon proper motion. It stated that while the Act is not as clear in some respects as it might be, it is at once apparent that it not only limits the crimes for which intercept authority may be obtained but also imposes important preconditions to obtaining any intercept at all. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." 94 S.Ct. at 1826-1827. The Court further held that the issue of suppression did not turn on the judicially fashioned exclusionary rule aimed at deterring violation of Fourth Amendment rights, but upon the provisions of Title III and therefore the suppression of the challenged wiretap evidence was correct. 94 S.Ct. 1831.

At page 1832 the court stated that the words "unlawfully intercepted" at 18 U.S.C. Section 2518(10(a)(i) were not limited to constitutional violations, and the Court thought Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

The Court cited Senate Report No. 1097, 90th Cong., 2d Session, 96 (1968) wherein it was noted that Section 2515 imposed an evidentiary sanction to compel compliance with the other prohibitions of the chapter and that such a suppression rule was necessary and proper to protect privacy. The provision thus formed an integral part of the system of limitations designed to protect privacy and, along with the criminal and civil remedies, it was to serve to guarantee that the standards of the new chapter would sharply curtail the unlawful interception of wire and oral communications.

United States v. *Giordano* also covered the question of extension orders, such as were involved in the instant case, and made it clear that the same requirements which had to be met to secure the original order also had to be met to secure the extension orders.

Thus, it is clear that suppression, in regard to wiretaps, does not turn on any judicially fashioned exclusionary rule aimed at deterring violations of the Fourth Amendment (although those grounds may also lie) but upon the provisions of Title III.

The Tenth Circuit was clearly in error, therefore, in attempting to circumvent the clear and unequivocal sanctions prescribed by Congress in Section 2515. Under its holding a judicial determination of non-prejudice should exempt the Government from compliance with the requirements of the statutory scheme. Creation of such an exception, however

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the * * * search, too

> likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *State of Ohio*, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L.Ed.2d 142.

The Government here ignored the procedure of antecedent justification that is central to the Act (and the Fourth Amendment), a procedure that Congress stated would be a precondition to electronic surveillance or else the results of the surveillance should be suppressed under Section 2515.

The Government had probable cause to believe Russo was engaged in bribery. Beyond question he was "known" and suspected. The Government, by its statements in its affidavits in support of the various applications for orders and extensions, sought the wiretap in order to overhear Russo and others and thereby secure "prosecutable evidence." Thus, Russo was "known" and the Government sought to intercept his communications, and that is all that Section 2518 requires. The Fourth Amendment requires that the place to be searched and the persons or things to be seized must be particularly described. Certainly a search warrant issued to seize a particular item "and others yet unknown" would be invalid.

Nor under the facts and circumstances of this case could the error be held to be "harmless beyond a reasonable doubt." An error in admitting plainly relevant evidence which *possibly* influenced the jury adversely to a litigant cannot be conceived of as harmless. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1967).

Prior Inconsistent Statements Issue

5. The Court of Appeals Rendered a Decision in Conflict With Decisions of Other Courts of Appeals on an Important Question of Federal Law Which Should Be Settled by This Court.

Admittedly, most of the decisions involve situations where the prosecution has used a prior inconsistent statement to impeach its own hostile witness. Here, however, the Petitioner impeached the Government witnesses against him by the use of numerous prior inconsistent statements, many of which were themselves incriminating to the Petitioner but which told a different story than that given by the witness at trial.

Russo requested an instruction regarding impeaching inconsistent statements. This instruction was taken from Federal Jury Practice and Instructions, Devitt and Blackmar, Vol. I, Section 12.05, and advised the jury, in part:

> "The testimony of a witness may be discredited or impeached by showing that he previously made statements which are inconsistent with his present testimony. *The earlier contradictory statements are admissible only to impeach the credibility of the witness, and not to establish the truth of these statements . . .*" (Emphasis added).

The prior inconsistent statements shown in the trial of this case are almost legion. Lowman was impeached by prior inconsistent statements to the F.B.I., by his prior inconsistent testimony before the Grand Jury, by his prior inconsistent testimony and statements at his plea of guilty, his testimony in Lawson's trial, and by his prior inconsistent testimony at the first trial of Petitioner. As to many of these,

Lowman testified they were wrong, he lied, or he didn't recall.

Lawson was likewise impeached by prior inconsistent statements and testimony, as was Joyce White, Chief Donnelly, and Dailey, who testified in his own defense, and was impeached by the Government.

It should be borne in mind that the trial court did instruct the jury that it could consider against Russo all statements made by the alleged co-conspirators, including Lawson, Lowman, Harmon, and Dailey.

One of the basic rights of a defendant on trial is the right to cross-examine the witness against him. Sixth Amendment to the United States Constitution. *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). To deny that right also denies due process of law as guaranteed by the Fifth Amendment, for it denies him a fundamental prerequisite to a fair trial.

In *United States* v. *Gregory* (5 C.A., 1973), 472 F.2d 484, the Government called a witness and on redirect examined him as to prior inconsistent testimony at a coroner's inquest on the basis the Government was surprised by his testimony. The Court there, in reversing, said, loc. cit. 487: "Prior statements of witnesses are hearsay and are generally inadmissible as affirmative proof", and cited *Bridges* v. *Wixon*, 326 U.S. 135 (1945). In *United States* v. *Hill* (5 C.A., 1973), 481 F.2d 929, the Government cross-examined a defense witness regarding a prior inconsistent statement. There the defendant did not request an instruction limiting the statement's use as impeachment only. In *Hill*, the court discussed *California* v. *Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970), but said that the orthodox view was that such statements are admissible only for impeachment purposes and not to establish the facts therein.

The Court there said loc. cit. 932: "It is the duty of the court, where so requested, to instruct the jury as to the limited purpose for which the impeaching evidence is admitted and advise the jury as to the extent to which the evidence may be considered." See also *United States* v. *Gilliam* (D.C. C.A., 1973), 484 F.2d 1093; *United States* v. *Neal* (10 C.A., 1971), 452 F.2d 1083; *Wheeler* v. *United States* (10 C.A., 1967) 382 F.2d 998; *Brooks* v. *United States* (10 C.A., 1962), 309 F.2d 580, cert. denied 383 U.S. 916 (1966); and *Tripp* v. *United States* (10 C.A., 1961), 295 F.2d 418.

If that be the rule where the Government seeks to impeach its own witness who is hostile or who has surprised them, certainly it must be the rule where a defendant is cross-examining a prosecution witness solely for the purpose of impeaching or discrediting him by showing he can't tell the same story, twice. See *United States* v. *Partin* (5 C.A., 1974), 493 F.2d 750, 760.

California v. *Green*, supra, does not change the situation. There this Court was passing on whether a California statute that provided that prior statements of a witness are not admissible under the hearsay rule if the statement is inconsistent with his trial testimony, and which had been construed by the California courts to be applicable only if the witness was subject to cross-examination at the time the prior inconsistent statement was made. In the state court there the court had held the statute inapplicable to testimony at a preliminary hearing. The witness for the prosecution at trial became uncooperative and evasive and the prosecutor read from his preliminary hearing testimony which was admitted in evidence as substantive proof. The California Supreme Court held that to deny the defendant's right to confrontation. This Court, in its Opinion, recognized the orthodox view discussed above (loc. cit. 154), and stated that it was not undertaking to decide if that view was correct as a matter of the law of evidence (loc. cit. 155), but only decided that the California statute did not violate the Sixth Amendment. In our present case the prior inconsistent statements were not offered to sustain the burden of either party but were offered solely to discredit the Government witness by establishing that they couldn't tell the same story twice. To place a defendant in a position of either establishing the prosecution's case through cross-examination or else foregoing proving the Government's witness is a liar, would turn out traditional notions of a fair trial upside down.

There is now a conflict in the Circuits, and this, being a question that is present in many criminal trials, should be settled by this Court.

CONCLUSION

Petitioner respectfully submits that this cause involves a decision that conflicts with decisions in other circuits, involves important and recurring questions of federal law which should be settled by this Court and that the decision below was in error and that justice requires the intervention of this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1791

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANTHONY R. RUSSO,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Kansas
(D. C. No. KC-CR-1816)

(Filed December 29, 1975)

Kurt P. Schulke, Special Attorney, United States Department of Justice (Robert J. Roth, United States Attorney, on the brief), for Plaintiff-Appellee.

Robert G. Duncan and Michael Lerner, for Defendant-Appellant.

Before SETH, McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

Anthony R. Russo was convicted by a jury of conspiring to carry on prostitution and bribery in Kansas in violation of the Kan.Stat.Ann. §§ 21-3512, 3513 and 3901 by traveling and causing travel in interstate commerce and by using and causing the use of facilities in interstate commerce, including wire communication facilities, in violation of 18 U.S.C. § 1952. On appeal the principal issue raised concerns the use at trial of certain tape recordings, and the written transcriptions thereof, which Russo contends resulted from an electronic surveillance which was in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. § 2510, *et seq.* This was a lengthy trial—two trials to be exact, with the first trial resulting in a mistrial just as the jury was about to start its deliberations—and the background facts must be set forth in some detail.

By indictment Anthony R. Russo, William M. Lowman, Jerry W. Lawson, and Thomas E. Dailey were charged with conspiracy. 18 U.S.C. § 371. Prior to trial two defendants, Lowman and Lawson, pleaded guilty and later testified against Russo and Dailey. The jury acquitted Dailey, but convicted Russo.

Lowman, a resident of Missouri, decided to open up a massage parlor in Kansas City, Kansas, which would be a front for a house of prostitution. In the conduct of his business operations, which extended over a two-year period, Lowman engaged in interstate travel and used interstate wire communication facilities.

Shortly after Lowman opened his massage parlor, the local Kansas City police raided his establishment and two of his girls were arrested. It was at this point in time that Lowman first met Anthony R. Russo, a local Kansas City, Kansas, attorney. Russo was hired to represent the two prostitutes in municipal court, and he apparently succeeded in having the charges dismissed. Lowman testified that he next approached Russo in the hope that Russo could somehow gain "protection" for Lowman's operations. Russo apparently was quite active in the criminal law practice in the area and was also the attorney for a police fraternal association. In any event, according to Lowman, Russo agreed to look into the matter, and later reported back that he could, and would, afford "protection" for the sum of $300 per month. Of that amount it was understood that a portion thereof was to be passed on by Russo to one Thomas E. Dailey, who was at that time Captain of the vice unit. Lowman further testified that as his operations expanded, first by opening another massage parlor and then by setting up prostitutes in several apartments, his payments to Russo also increased, first to $500 per month and then to $1000 per month. The "protection" which Lowman was to receive was advance notice of any raids by the police on his massage parlors.

Shortly after Lowman opened his first massage parlor he met Jerry W. Lawson, who was a member of the Kansas City, Kansas, police department assigned to traffic control. Lowman asked Lawson to "keep an eye" on his massage parlor, and he initially repaid such courtesy by occasionally buying Lawson a dinner. He next began to from time to time give Lawson a $20 bill, and still later Lawson bought

into the massage parlor business with an investment of some $1500. It was at about this time that Lawson, according to his testimony, started delivering payoff money to Dailey, the Captain of the vice squad, in return for which he too was to receive advance notice of any raids which were to be conducted by the police.

As above indicated, the main issue raised on appeal concerns wiretaps placed on telephones in the two massage parlors operated by Lowman. In this regard it is Russo's position that both the application made to the trial court for a wiretap and the order authorizing the wiretap were insufficient in that neither complied with the requirements of 18 U.S.C. § 2518. More specifically, Russo contends that the Government had "probable cause" to believe that he, Russo, was "committing the offense and whose communications are to be intercepted," and that pursuant to 18 U.S.C. § 2518(1)(b)(4) and (4)(a) he should have been identified by name in both the application for the wiretap and the order authorizing such. Russo was not so identified, and in such circumstance Russo argues the intercepts of his telephone conversations should not have been received into evidence and his motion to suppress should have been granted. Let us examine the several applications and orders and extensions of wiretap authorization.

On October 12, 1972, one Kurt P. Schulke, a special attorney of the Organized Crime and Racketeering Section, filed written application in the United States District Court for the District of Kansas and sought authorization to intercept wire and oral communications on the telephones located in Massage Therapy at 915 North 10th, and the Southwest Massage, located at 900 Southwest Boulevard, both in Kansas City, Kansas. These two massage parlors were operated by Lowman and the telephone located in each massage parlor was listed under Lowman's name. The application sought to intercept the wire and oral communications of William M. Lowman and "others as yet unknown." Russo's name is nowhere mentioned in the application.

The affidavit of one David D. Patton, a special agent with the Federal Bureau of Investigation, was also filed with the trial court in support of the application for a wiretap. In the affidavit, Patton stated that based on his investigative efforts, which he detailed at considerable length, he had probable cause to believe that "William M. Lowman and others as yet unknown" were committing offenses involving interstate travel. In support of his "belief" Patton set forth the "facts and circumstances" which he relied on. Much of the facts and circumstances related by agent Patton came from one Ted Irving, a former business associate of Lowman. Russo's name was mentioned several times in Patton's narration of the facts. In the main, Russo's name was injected into the matter through statements by Irving to the effect that Lowman had told him that he (Lowman) was making payoffs to Russo, and through Russo to the local police, as protection money to cover the illegal prostitution business being carried on by Lowman. So Russo's name was brought into the matter purely by way of hearsay, double hearsay we might add. We would note parenthetically that Dailey's name was only injected into the investigation on the basis of triple hearsay.

The trial court granted the application and on October 12, 1972, authorized a twenty-day wiretap on the phones located in the Massage Therapy and the

Southwest Massage. The order stated that there was "probable cause to believe that William M. Lowman and others as yet unknown have committed and are committing offenses involving the traveling in interstate commerce." Russo's name was not in anywise mentioned in the court's order.

The record indicates that there were a great number of telephone calls into and from the two telephones which had been tapped, to the end that altogether there were approximately 150 tape recordings of various intercepts which totaled approximately 7000 individual intercepts. We are here concerned with only five calls made into the tapped phones by one who identified himself as "Tony." It was later established that "Tony" was Anthony Russo, the appellant. The first of these five calls occurred on October 20, 1972, at 3:22 P. M., and the complete intercept is set forth herein as Appendix A.

On November 1, 1972, Schulke made application to the trial court to extend the wiretap orders another twenty days. In this application Schulke stated that there was probable cause to believe that "William M. Lawson, Jerry Lawson and others yet unknown have committed and are committing offenses . . ." and that there was reason to believe that these persons thus identified would be using the telephones in the two massage parlors here involved. No mention of Russo was made in the application. Russo's name was again mentioned in the supporting affidavit made by agent Patton. This application for a twenty-day extension was granted by the trial court on November 1, 1972, with Russo not being identified by name in the court's order.

On November 7, 1972, a person identifying himself as "Tony" made three calls to the telephone in

the Massage Therapy. This person was identified upon trial as being Anthony Russo, the appellant. The transcript of these three conversations is set forth as Appendix B.

The only other intercept of Russo's telephone conversations occurred on November 20, 1972, when a person using the name of "Tony" called the Massage Therapy phone number. It was later determined that the caller using the name "Tony" was in fact Anthony Russo. The conversation occurring on that particular occasion is set forth as Appendix C.

On November 22, 1972, Kurt Schulke made application to the court for an additional twenty-day extension of the wiretap order. Again it was indicated that Lowman and Lawson and "others as yet unknown" were believed to be committing offenses and using the phones on which wiretap had been previously authorized in connection with their criminal activity. No mention of Russo, as such, was made in the application.

In his supporting affidavit agent Patton did refer to Russo in several instances and he concluded with this comment:

> It is also apparent that Anthony Russo and Tom Dailey, the head of the Kansas City, Kansas, Vice-squad, have some involvement in Lowman and Lawson's operations; however, at this time, the extent and nature of that involvement is not known.

On November 22, 1972, the trial court extended the wiretap order for twenty days. The order referred to Lowman and Lawson "and others as yet unknown," and did not identify Russo by name.

There were no further intercepts of any telephone conversations which were later identified as being those

of Russo. However, as above indicated, there was a heavy traffic of calls both in and out of the tapped phones, but only five were later established to be those of Russo.

Prior to the first trial of his case Russo moved to suppress the use of the five tapes of his telephone calls to the phone at Massage Therapy. The trial court denied the motion and the tapes and transcriptions thereof were used at trial. The method used by the Government to introduce these tapes was in the first instance to have the individual who conversed with Russo testify before the jury as to the substance of their conversation. Then, over objection, the Government would play the tape in question for the jury. Additionally, a transcription of the tape was given the jury for their use. So, the tapes merely corroborated, but effectively so, we might add, that which a witness had already testified to.

Russo contends that the wiretap orders and applications therefor were deficient in that the Government had probable cause to believe that he, Russo, was engaged in the criminal activity which precipitated the request for a wiretap, and that he would use the target phones in connection with such criminal activity. Such being the case, Russo asserts that he should have been identified by name in the wiretap orders and applications therefor and, not having been so identified, the tapes and transcriptions thereof should have been suppressed. In thus arguing, Russo relies on such cases as United States v. Kahn, 415 U.S. 143 (1974); United States v. Moore, 513 F.2d 485 (D.C.Cir. 1975); United States v. Donovan, 513 F.2d 337 (6th Cir. 1975); and United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975).

The rule that we glean from *Kahn* is that if the Government "knows," i.e., has "probable cause" to

believe, that a particular person is committing an offense for which the wiretap is sought, and also "knows" that such individual is likely to use the target telephone in furtherance of such criminal activity, then, and only then, need the application and order for a wiretap identify such person by name. We believe our reading of *Kahn* to be in general accord with the interpretation given that case in *Moore*, *Donovan* and *Bernstein*.

In denying the pre-trial motion to suppress, the trial judge in the instant case commented as follows:

> [W]hile the defendant Russo was a person "known", at least by hearsay information, to be committing the offense, it was not necessary that his name be specified in the order as one whose communications were to be intercepted as he was not shown to be the owner of, or a person likely to be using the particular telephone to which the wire tap was to be attached, . . .

We agree with the trial court that as of October 12, 1972, the date of the first intercept order, the Government did not have probable cause to believe that Russo would be using the target phone. We are of the further view that the Government at that point in time did not even have probable cause to believe that Russo was committing the particular offense in connection with which the tap was sought. The trial judge pointed out the weakness of any suggestion that the Government had probable cause by noting that any such belief was necessarily based on pure hearsay. We are not saying that hearsay can never support a finding of probable cause in this context. Indeed, it has been held that even double hearsay does not in and of itself preclude a finding of probable cause. United States v. Kleve, 465 F.2d 187 (8th Cir. 1972). We are holding, however, that the hearsay relied on in the

instant case is insufficient to warrant a finding of probable cause to believe that Russo was either committing the offense for which the wiretap was sought or that he would use the target phone in furtherance of any such criminal activity.

Any suggestion that as of October 12, 1972, Russo was personally involved in the criminal activity for which the tap was sought, or that he would use the target phone in connection with such activity, is based almost entirely on statements given the FBI by one Ted Irving, a former partner of Lowman, who related statements made to him by Lowman which in turn implicated Russo. Irving's statements to the FBI were not based on any personal contact he had with Russo. There is nothing in the record to indicate the reliability of Lowman. Indeed, at trial it developed that Lowman was a chronic name dropper. Under all the circumstances, we hold that there was not probable cause to believe that Russo was committing the offense for which the wiretap was sought or that he would be using the target phone. Hence, there was no need to identify Russo by name in either the application or order of October 12, 1972. No doubt there was suspicion that Russo was involved, but suspicion does not equate to probable cause. Having determined that the application and order of October 12, 1972, complied with the applicable statute, the trial court in our view properly admitted into evidence the tape of the intercept made on October 20, 1972.

Counsel also argues that assuming that the order of October 12, 1972, was proper, that by November 1, 1972, when the wiretap order was extended for twenty days, the Government had probable cause to believe both that Russo was committing the offense for which the wiretap was first sought and that he would use

the target phone in connection with such activity. Whether the Government at that time had such probable cause is at best a debatable matter. Certainly the Government had no hard evidence upon which to base a belief of probable cause, only the statements of Irving as to what Lowman had told him concerning Russo, and the intercept of Russo's one telephone call made to the target phone on October 20, 1972. While that one call indicated that Russo was concerned about the slump in business, the intercept itself falls far short of establishing that Russo had in fact been assisting in the operation of the massage parlor by accepting payoff money with which to gain police protection. Probable cause to us means *probable* cause, and we doubt that the Government had such probable cause on November 1, 1972.

Additionally, the only intercepts of Russo made pursuant to the extension order of November 1, 1972, occurred on November 7, 1972, and November 20, 1972, and are in our view innocuous in their content. In each instance a person identified upon trial as being Russo asked for Bill Lowman. In three of these four intercepts Russo was simply advised that Lowman was not in. On one intercept Lowman was in, and he agreed to meet with Russo in the latter's office. The content of these telephone conversations did not pertain to prostitution, as such, or bribery, or interstate travel. All these four brief telephone conversations indicated was that Russo was acquainted with Lowman. And the fact that Lowman and Russo were acquainted was not in dispute. Evidence adduced at trial clearly established that such acquaintance was initiated when Russo agreed to represent two of Lowman's prostitutes who had been "busted." It was also undisputed, by way of further example that Russo and Lowman were

friends, that Russo had rented Lowman one of his (Russo's) apartments in which Lowman later installed a prostitute. So, all in all, the fact that Russo and Lowman were well acquainted was not in dispute, and this is about all any of these intercepts established. It is on this basis that we conclude that the tape intercepts of November 7 and November 20, 1972, were innocuous, and the admission thereof, if it somehow be deemed error, was indeed harmless beyond a reasonable doubt.

We are here concerned with alleged noncompliance with a statute. Even a violation of a constitutional right does not require a reversal if the error was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969), and Chapman v. California, 386 U.S. 18 (1967). In this general regard, *see also* United States v. Rizzo, 492 F.2d 443 (2d Cir. 1974), where in a slightly different context it was held that the "touchstone" in determining whether to suppress wiretap evidence on a claim of failure of notice should be resultant prejudice to the defendant. In our best view the five tapes of Russo's calls to the target phone played only a minor role in the trial and did not in any real sense prejudice Russo. The damaging testimony came from Lowman, Lawson, Harmon, an unindicted coconspirator, Jodie White, a prostitute, and one Wayne McGraw, Russo's own real estate broker, who, at Russo's direction, rented one of Russo's apartments to Lowman for the purpose of furthering Lowman's prostitution activities.

Both before and after trial Russo attacked the sufficiency of the indictment. In this regard it is Russo's position that the indictment merely charged Russo and the others with conspiracy to violate the laws of Kansas in regard to prostitution and bribery, and that such

does not state a federal offense. Although the indictment under consideration could of course have been somewhat differently couched, we nonetheless believe it does charge a federal offense.

In the first instance the indictment alleges that the various defendants conspired to violate Kansas laws regarding prostitution and bribery "by traveling and causing travel in interstate commerce and by using and by causing the use of facilities in interstate commerce, including wire communication facilities, in violation of Section 1952, Title 18, United States Code. . . ." Following the aforesaid allegations the indictment then sets forth some twenty-two overt acts and concluded with the following: "All in violation of Section 371, Title 18, United States Code." Such in our view adequately pleads a federal offense.

Fed.R.Crim.P. 7 declares that an indictment shall be a plain, concise and definite statement of the essential facts constituting the offense charged. In United States v. Wilshire Company of Texas, 427 F.2d 969 (10th Cir. 1970), we commented as follows:

> . . . To determine the sufficiency of an indictment the court views the entire document to ascertain whether the offense is charged with sufficient clarity so as to safeguard two constitutional guarantees; the Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare a defense; and the Fifth Amendment protection against twice being placed in jeopardy for the identical offense. . . .

In our view the indictment in the instant case is sufficient under the general principles above enunciated. Starting at the end of the indictment and then working backward, it is clear to us that the indictment

charges a federal conspiracy under 18 U.S.C. § 371 to violate 18 U.S.C. § 1952 by traveling in interstate commerce with an intent to promote unlawful activity in Kansas in violation of the laws of Kansas. Russo's attack on the present indictment is essentially one of semantics. We deem the indictment to be sufficient.

Prior to the first trial of this matter, Russo filed a motion for a hearing as to the admissibility of the results of certain polygraph examinations. Apparently Russo had at his own instance undergone a so-called "lie detector" test and he sought to have the results thereof introduced at trial. The trial judge indicated that he was of the definite view that under existing Tenth Circuit law the results of a polygraph test were not admissible in evidence. However, the trial judge did not absolutely foreclose a hearing on the matter, and suggested that counsel for Russo make an offer of proof to assist in any final determination as to whether there should be a full hearing on the question. When the case came on for trial some two months later, no such offer of proof had been made. Accordingly, the trial court on the first day of the trial denied Russo's motion for a hearing. Then, a day or two later, a formal offer of proof was made by counsel. In our view the offer of proof, in addition to being untimely filed, was itself insufficient to require the trial court to hold a full-scale evidentiary hearing into the matter.

It is true that in United States v. Wainwright, 413 F.2d 796 (10th Cir. 1969), there is some indication that conceivably the results of a polygraph test might at some future date constitute admissible evidence, with the comment that "matters of factual proof must keep pace with developing scientific standards." However, in *Wainwright* we quoted with approval from

Wigmore to the effect that before such evidence be admitted there must be a showing, and we would here add a strong showing, " 'that the proposed test is an accepted one in the profession and that it has a reasonable measure of precision in its indications.' " In our view the belated offer of proof in the instant case does not meet the requirements of *Wainwright* and is not such as to have compelled the trial court to hold an evidentiary hearing on the matter. For other Tenth Circuit cases holding that the results of a lie-detector test are inadmissible, *see* Wainwright v. United States, 448 F.2d 984 (10th Cir. 1971), and United States v. Rodgers, 419 F.2d 1315 (10th Cir. 1969).

The remaining matters urged on appeal are relatively minor in nature and do not merit much comment. We find no error in the instructions given the jury concerning statements made prior to trial which are inconsistent with testimony given at trial, and the impeaching effect thereof.

Similarly, in our view there was no need to instruct the jury on any "two conspiracy" theory. There was but one conspiracy, involving several different persons, each playing his own role, and involving interstate travel for the purposes of promoting and maintaining houses of prostitution in violation of Kansas law. The fact that prostitution was carried on in both massage parlors and apartments does not make for two conspiracies. Nor is the bribery aspect of the case a separate matter. The bribery was for the purpose of furthering the prostitution operation and was in a sense ancillary thereto.

The final contention that the evidence is legally insufficient to support the verdict is wholly untenable. The rather lengthy recitals in this opinion should fully

convince the disinterested reader, if not the defendant himself, that the evidence is amply sufficient to support the verdict.

Judgment affirmed.

APPENDIX A.

"Time: 3:22 P.M.

Date: October 20, 1972

Telephone number: 371-2989

TERRY: Hello.

TONY: Hi, Terry. Hello, who's this?

TERRY: This is Terry.

TONY: Terry, this is Tony. How are you baby?

TERRY: Uh, huh, fine.

TONY: Listen, is Bill there?

TERRY: He just left.

TONY: Where'd he go, back to the other place?

TERRY: I don't know. He said, well, I'm going, I'll see you later. I said OK. He didn't tell me. Walked out the door about five minute ago.

TONY: What's the number on 10th Street?

TERRY: Uh, 321.

TONY: Just a minute, OKay.

TONY: 321-0026.

TONY: 0026.

TERRY: Un, huh.

TONY: How you doing? Any good?

TERRY: No, I haven't made a dime in a week.

TONY: Really.

TERRY: Hasn't been a customer up here all week.

TONY: What the hell's going on.

TERRY: I don't know, but I'm getting ready to quit. I can't stand it. I told Bill today.

TONY: What'd he say?

TERRY: What can he say? Nothing.

TONY: No I mean there's got to be a reason why we're not getting, why you haven't got any business.

TERRY: I don't know. Bill just opened up a new Massage house.

TONY: Where?

TERRY: Hank and Berta.

TONY: Where's that?

TERRY: 17th and Stewart.

TONY: Bill opened it?

TERRY: No. Um un.

TONY: Who opened it? Do you know?

TERRY: Hank and Berta somebody.

TONY: 17th and Stewart, hum. Okay, I'll talk to you later baby.

TERRY: Okay, bye bye."

APPENDIX B.

"Time: 12:15 p.m.

Date: 11/7/72

Telephone number: 371-2989

PAF: Hello.

TONY: Hi, this is Tony, is Bill there?

PAF: No he isn't.

TONY: Ah, is he down in Springfield, honey, or is he up here?

PAF: He's probably back here, he's usually up here about 2:30 or 3:00, he should be up here about 3 o'clock.

TONY: Tell him I called and it's important, I want to talk to him.

PAF: Tony?

TONY: Yeah.

PAF: Ok, then.

TONY: Thank honey—bye.

PAF: Ok bye."

* * *

"Time: 4:30 p.m.

Date: 11/7/72

Telephone number: 371-2989

PAF: Therapy Massage.

TONY: Hi, this is Tony is Bill there?

PAF: Ah, he hasn't come in yet Tony, I got a message up here for him to call you.

TONY: Yea, it's important I want him to get a hold of me, OK.

PAF: OK.

TONY: Thank honey—bye.

PAF: Bye."

* * *

"Time: 5:12 p.m.

Date: 11/7/72

Telephone number: 371-2989

BILL: Hello.

TONY: Bill?

BILL: Yeah.

TONY: This is Tony.

BILL: Yeah, I was just trying to get ya, just came in just right now.

TONY: OK, are you coming down here or tonight or what?

BILL: I can come tonight or in the morning.

TONY: Well, I've got some people who have been waiting on me, why don't, can you come over now?

BILL: Yes, I can run over there.

TONY: OK, see you in a little bit, bye, bye.

BILL: OK."

APPENDIX C.

"Time: 5:35 P.M.

Date: November 20, 1972

Telephone number: 321-0026 to 371-2989

TONY: 2989?

PAF: Therapy Massage.

TONY: Is Bill there? This is Tony.

PAF: No, he isn't.

TONY: OKay, Thank you.

PAF: Uh, huh.

TONY: Yeah, he's not there."

APPENDIX B

JANUARY TERM—JANUARY 26, 1976

Before The Honorable David T. Lewis, Chief Judge, The Honorable Delmas C. Hill, The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, and The Honorable William E. Doyle, Circuit Judges

No. 74-1791

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANTHONY R. RUSSO,
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing with suggestion for rehearing en banc which was filed by the appellant in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, McWilliams and Doyle, to whom the case was submitted.

The petition for rehearing having been denied by the original panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

APPENDIX C

JANUARY TERM—FEBRUARY 9, 1976

Before The Honorable Oliver Seth, The Honorable Robert H. McWilliams and The Honorable William E. Doyle, Circuit Judges

No. 74-1791

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANTHONY R. RUSSO,
Defendant-Appellant.

This matter comes on for consideration of appellant's motion for stay of mandate pending application for a petition for writ of certiorari.

Upon consideration whereof, it is ordered that the mandate is stayed to and including March 10, 1976, pending the timely filing by appellant of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this

Court shall receive notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

Howard K. Phillips, Clerk
By: /s/ Robert L. Hoecker
Chief Deputy Clerk

Supreme Court, U. S.
FILED
MAY 12 1976
MICHAEL RODAK, JR., CLERK

No. 75-1218

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY R. RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

MARC PHILIP RICHMAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ANTHONY R. RUSSO, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 527 F.2d 1051.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1975. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 26, 1976. The petition for a writ of certiorari was filed on February 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence derived from court-authorized wire interceptions should have been suppressed because petitioner was not named in the intercept applications and orders.

2. Whether the trial court erred in not giving a requested instruction regarding prior inconsistent statements of witnesses.

STATEMENT

After a second jury trial[1] in the United States District Court for the District of Kansas, petitioner was convicted of conspiring with others[2] to violate 18 U.S.C. 1952 by traveling in interstate commerce and using interstate telephones to carry on acts of prostitution and bribery contrary to state law, in violation of 18 U.S.C. 371. He was sentenced to two years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. A; 527 F.2d 1051).

The facts are set forth in detail in the opinion of the court of appeals (Pet. App. A2-A4). Briefly, they show that co-defendant Lowman, a resident of Missouri, operated massage parlors in Kansas City, Kansas, which were fronts for houses of prostitution. Petitioner, an attorney with police connections, agreed to provide Lowman with advance notice of any police plans to raid his illegal establishments. Petitioner received payments of as much as $1,000 a month for this service, a portion of which was allegedly passed on to co-defendant Dailey, captain of the Kansas City police vice unit. Jerry Lawson was a police officer who also agreed to provide protection to Lowman and who later went into business with him.

[1]The first trial ended in a mistrial because of a juror's misconduct.

[2]Co-defendants William Lowman and Jerry Lawson pleaded guilty to participating in the conspiraey and testified for the government at petitioner's trial. Lowman was sentenced to six months' imprisonment and Lawson was sentenced to imprisonment for a year and a day. Co-defendant Thomas Dailey was acquitted by the jury.

As corroborative evidence, the government introduced five telephone conversations between petitioner and his co-conspirators, which were monitored pursuant to court authorized electronic surveillance of three massage parlors and an apartment, all used by Lowman in his prostitution business.[3] Two massage parlors were monitored for 20 days pursuant to an order issued by Judge Earl E. O'Connor of the United States District Court for the District of Kansas on October 12, 1972; this authorization was extended for an additional 20 days on November 1, 1972. On the same date, Judge O'Connor also authorized simultaneous monitoring of the third massage parlor and the apartment.[4]

ARGUMENT

1. Petitioner contends that he was a person "known" to be committing the offense and whose communications would be intercepted, and thus that under 18 U.S.C. 2518(1)(b)(iv) and 4(a) the government was required to name him in the three intercept applications, and that its failure to do so required suppression of the evidence against him derived from the interceptions. The courts below rejected the premise of petitioner's claim; both the district court and the court of appeals found that there had been no probable cause for the government to believe that incriminating conversations of petitioner would be overheard during the interception (Pet. App. A9). There

[3]The conversations, which are reproduced as an appendix to the court of appeals' opinion (Pet. App. A16-A20), are innocuous on their face. In four of them, petitioner asks to talk to "Bill," who is out; in one of these, petitioner sympathizes with the complaints of the woman who answers the phone that business is bad because a new massage parlor has been opened. In the fifth conversation, "Bill" agrees to meet petitioner right away.

[4]This order was extended for an additional 20 days, but petitioner was not overheard during the extension period.

is no need for this Court to review this essentially factual determination. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275.[5] Thus, although petitioner correctly points out (Pet. 20-22) that there is a conflict in the circuits on the scope of the naming requirement in 18 U.S.C. 2518(1)(b)(iv) and 4(a), that conflict is not implicated in this case, and there is no indication that any court of appeals would have sustained petitioner's contention. There is, accordingly, no need to hold this case pending the disposition of *United States* v. *Donovan,* No. 75-212, certiorari granted, February 23, 1976, the outcome of which will not affect the proper disposition of this case.

2. During cross-examination of government witnesses, petitioner questioned them about prior statements made to the FBI and at previous court appearances, for the purpose of impeaching their testimony (Pet. 28-29). Petitioner asked the court to instruct the jury that these prior statements were "admissible only to impeach the credibility of the witness, and not to establish the truth of these statements" (Pet. 11). The court refused to give the requested instruction, although the substance of it was conveyed to the jury.

Petitioner points to no way in which the statements offered for impeachment were more incriminating than the direct testimony of the witnesses, and we are aware of none. There was accordingly no real chance that the jury would convict on the basis of the prior statements, rather than the direct evidence of the witnesses. Nor was

[5]Contrary to petitioner's claim (Pet. 22), the court below did not hold that hearsay cannot support a determination of probable cause, but only that on the particular facts of this case, the hearsay statements known to the government and contained in the affidavit supporting the intercept application were not sufficient (Pet. App. A9-A10).

there any need to warn the jury that the statements were unreliable as proof of guilt because petitioner was unable to test their truth by cross-examination, since the declarants testified at trial and were fully cross-examined, See *Nelson* v. *O'Neil,* 402 U.S. 622; *California* v. *Green,* 399 U.S. 149. In these circumstances, there was no necessity for the requested instruction.[6]

In any event, the instructions given conveyed to the jury the substance of the requested instruction. First, the judge told the jury that statements made by co-conspirators during and in furtherance of the conspiracy could be considered as to all co-conspirators (Tr. 2939). He then instructed the jurors in effect that the statements made to the FBI and at previous court appearances could not be used against petitioner (Tr. 2939-2940): "statements of any conspiracy [*sic*] which are not in furtherance of the conspiracy, or made before its existence or after its termination, may be considered as evidence only against the person making them." Finally, the jury was told the purpose for which the previous statements could be considered (Tr. 2943):

> A witness may be discredited or impeached * * * by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony * * *.

Thus the substance of the requested instruction was given: that the previous statements could not be considered as evidence against petitioner, but that they could be

[6]Since the witnesses had given direct testimony in court regarding petitioner's involvement in the criminal enterprise, and petitioner points to nothing in the prior statements he brought out on cross-examination of a significantly inculpatory nature, there is no conflict between the decision below and those in the cases cited at Pet. 29-30.

considered as impeaching evidence against the witnesses who made them. It is also significant that the statements in question were not introduced by the government as part of its proof, but by the defendant during cross-examination of the witnesses. Hence, the judge's instructions only explained what must have been obvious to the jury throughout the trial, namely, that the prior statements were introduced only for impeachment purposes. Under the circumstances, the court below correctly held that there was no error in the instructions given.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MARC PHILIP RICHMAN,
Attorney.

MAY 1976.